

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs February 20, 2008

FREDRICK TUCKER v. STATE OF TENNESSEE

**Direct Appeal from the Criminal Court for Davidson County
No. 2003-A-492 Monte Watkins, Judge**

No. M2007-00681-CCA-R3-PC - Filed July 14, 2008

The petitioner, Fredrick Tucker, appeals the Davidson County Criminal Court's denial of his petition for post-conviction relief from his jury conviction for child rape and resulting twenty-one-year sentence. He contends that he received the ineffective assistance of counsel because his trial attorney (1) failed to attack the victim's credibility aggressively during cross-examination and (2) failed to call any favorable witnesses on his behalf. Based upon the record and the parties' briefs, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS, J., and DAVID G. HAYES, SR. J., joined.

Isaac T. Conner, Nashville, Tennessee, for the appellant, Fredrick Tucker.

Robert E. Cooper, Jr., Attorney General and Reporter; Preston Shipp, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Brian Holmgren and Roger Moore, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

The evidence at trial revealed that the petitioner was Cynthia Tucker's son and that Cynthia Tucker was the ex-girlfriend of the victim's father. State v. Frederick Leon Tucker, No. M2005-00839-CCA-R3-CD, 2006 Tenn. Crim. App. LEXIS 210, at *2 (Nashville, Mar. 7, 2006). On Christmas night in 2002, the then ten-year-old victim, her father, and her sister spent the night at Ms. Tucker's home. Id. The victim, her sister, and the petitioner's daughter slept downstairs in the living room. Id. At some point during the night, the petitioner knocked on the door and the petitioner's daughter let him into the house. Id. at **2-3. The victim, who was sleeping on the couch on her stomach, testified that the petitioner pulled down her panties, got on top of her, and put

his penis inside her buttocks. Id. at *3. Afterward, the victim went upstairs and told her father about the rape, and he took her to the hospital. Id. at **3-4. Before nurses performed a physical examination for the victim's rape test kit, the victim met with a psychologist and told the psychologist that the petitioner's "private part touched in the inside of her butt." Id. at *8. Although the physical examination did not reveal whether the victim had been penetrated anally, forensic testing on perirectal and gluteal cleft swabs in the victim's rape kit revealed that the petitioner's sperm was present. Id. at **9, 13. The jury convicted the petitioner of child rape, a Class A felony, and this court affirmed the petitioner's conviction. Id. at *2.

Subsequently, the petitioner filed a pro se petition for post-conviction relief, arguing that he was denied the effective assistance of counsel because his trial attorney failed to call the petitioner's mother to testify on his behalf; failed to object to the "sloppy handling" of the DNA evidence; failed to object to sleeping jurors; failed to question the victim about a statement she made to Pamela Scretchen, an examiner from the Nashville Child Advocacy Center, during an interview in February 2003 that was inconsistent with the victim's trial testimony; and failed to have the defense's DNA expert testify. The post-conviction court appointed counsel, and counsel filed an amended petition. In the amended petition, counsel argued that the petitioner's constitutional right to a jury trial was violated because jurors slept through his trial and that trial counsel was ineffective because he failed to call any witnesses, including Scretchen, to testify.

At the evidentiary hearing, the petitioner testified that his trial attorney was appointed to represent him. The petitioner had been diagnosed with bipolar disorder, dissociative disorder, major depression, and post-traumatic stress disorder and was taking medication and receiving therapy at the time of the alleged crime. He had wanted to use his mental defect as a defense at trial, but counsel told him that was not an option and would not "stand up." The petitioner told counsel to meet with the petitioner's psychiatrist, but the petitioner was unaware if counsel did so or if counsel reviewed his psychological history. The petitioner wanted Dr. Pamela Auble, the court-appointed psychologist; Pamela Scretchen; and his daughter to testify on his behalf at trial. He and counsel talked about the witnesses testifying, and when his attorney failed to call any of the witnesses at trial, the petitioner was shocked. Counsel wanted the petitioner to plead guilty, but the petitioner was not interested in a guilty plea, which frustrated counsel. Counsel advised the petitioner not to testify at trial, and the petitioner followed counsel's advice because he trusted his lawyer. He stated that if he had known no witnesses were going to testify on his behalf, he would not have gone to trial with his attorney. The petitioner told counsel that some of the jurors were sleeping during the trial, but counsel told him, "[N]ever mind."

On cross-examination, the petitioner testified that he could not explain how his semen ended up in the victim's panties. He stated that he told trial counsel that he remembered going to his mother's house on Christmas night and that "outside of myself, I saw myself touching [the victim]." The victim woke up, told the petitioner to stop, and he left the residence. Although the petitioner put his hand on the victim's buttocks, he did not have sex with her. He wanted to testify "to this set of facts" at trial, but counsel did not believe it was a good idea. The petitioner's daughter was in the room during the alleged rape, and the petitioner did not know exactly what her testimony would have

been at trial. Dr. Auble evaluated the petitioner and stated in her notes that the petitioner displayed dissociative disorder. The petitioner believed her testimony would have been helpful to his defense. The victim told Pamela Scretchen during an interview that the petitioner put his penis “on top” of her buttocks, but the victim testified at trial that he put his penis inside her buttocks. Counsel did not cross-examine the victim about the inconsistency and did not have Scretchen testify. Scretchen could have contradicted the victim’s trial testimony.

Shatekia Elam, the petitioner’s girlfriend, testified that she attended the petitioner’s trial and saw at least one juror asleep. On cross-examination, Elam testified that she told the petitioner’s mother about the sleeping juror, that the petitioner’s mother told defense counsel, and that counsel did not do anything about the juror.

The petitioner’s trial attorney testified that he had been an attorney with the Metropolitan Public Defender’s Office since 1996, practiced criminal law exclusively, and handled many jury trials involving Class A felonies. He and another attorney from the public defender’s office were assigned to represent the petitioner. Counsel and co-counsel spent more than one hundred hours working on the petitioner’s case, and counsel met with the petitioner “[m]any, many times.” The petitioner claimed that he did not remember what happened to the victim. Although the petitioner had wanted to use an insanity defense, counsel thought that would have been difficult. The defense’s position was that the petitioner may have done something improper, such as masturbate near the victim, but that he did not penetrate her. Counsel did not want to call Dr. Auble to testify because she could not support an insanity defense. As for the petitioner’s daughter, counsel thought she would have testified that she let the petitioner into the house and then went back to sleep. Counsel reviewed Pamela Scretchen’s interview with the victim and considered it carefully. Counsel believed the State would have been able to “smooth . . . over” the “on” and “in” inconsistency and could have had more information from the interview admitted into evidence. Counsel thought the defense had “potentially scored enough points and that our situation was favorable enough” that it did not need Scretchen to testify.

Trial counsel testified that he was familiar with the evidentiary rule regarding impeaching a witness with a prior inconsistent statement and that he thought he asked the victim about her prior inconsistent statement to Scretchen. He did not remember if the victim denied making the inconsistent statement, and counsel did not view the victim’s trial testimony as being very different from what she told Scretchen. After talking with the defense’s DNA expert, counsel decided that it would not be helpful to try to argue that the DNA found in the rape kit belonged to someone other than the petitioner. Counsel did not recall any juror sleeping during the trial. Counsel advised the petitioner not to testify, and the petitioner did not insist on testifying. On cross-examination, counsel testified that he did not promise the petitioner the defense would call witnesses and that the petitioner did not want his daughter to testify for him.

The post-conviction court concluded that the petitioner was not credible. The court noted that trial counsel believed the witnesses the petitioner wanted counsel to call on his behalf were not

material to the petitioner's case and that the petitioner failed to have any of the witnesses testify at the evidentiary hearing. The post-conviction court denied the petition for post-conviction relief.

II. Analysis

The petitioner argues that he received the ineffective assistance of counsel because his trial attorney failed to attack the victim's credibility aggressively during cross-examination. He argues that aggressive cross-examination was necessary because the victim testified at trial that the petitioner laid on top of her and put his penis inside her buttocks but told Pamela Scretchen in a February 2003 interview that the petitioner was sitting on the couch during the rape and put his penis "on top" of her buttocks. The petitioner also contends that he received the ineffective assistance of counsel because his attorney failed to call any favorable witnesses on his behalf. The State argues that the post-conviction court properly denied the petition for post-conviction relief. We agree with the State.

To be successful in a claim for post-conviction relief, the petitioner must prove all factual allegations contained in the post-conviction petition by clear and convincing evidence. See Tenn. Code Ann. § 40-30-110(f). "Clear and convincing evidence means evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence." State v. Holder, 15 S.W.3d 905, 911 (Tenn. Crim. App. 1999) (quoting Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901 n.2 (Tenn. 1992)). Issues regarding the credibility of witnesses, the weight and value to be accorded their testimony, and the factual questions raised by the evidence adduced at trial are to be resolved by the post-conviction court as the trier of fact. See Henley v. State, 960 S.W.2d 572, 579 (Tenn. 1997). Therefore, we afford the post-conviction court's findings of fact the weight of a jury verdict, with such findings being conclusive on appeal absent a showing that the evidence in the record preponderates against those findings. Id. at 578.

A claim of ineffective assistance of counsel is a mixed question of law and fact. See State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999). We will review the post-conviction court's findings of fact de novo with a presumption that those findings are correct. See Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001). However, we will review the post-conviction court's conclusions of law purely de novo. Id.

"To establish ineffective assistance of counsel, the petitioner bears the burden of proving both that counsel's performance was deficient and that the deficiency prejudiced the defense." Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984)). In evaluating whether the petitioner has met this burden, this court must determine whether counsel's performance was within the range of competence required of attorneys in criminal cases. See Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975).

Initially, we note that at the conclusion of the evidentiary hearing, the petitioner asked that the direct appeal record be made an exhibit, and the court reporter listed the direct appeal record as exhibit three. However, the record was not included with the post-conviction record on appeal.

Regardless, this court may take judicial notice of the direct appeal record. See State ex rel. Wilkerson v. Bomar, 376 S.W.2d 451, 453 (Tenn. 1964). We choose to do so in this case.

In his petition for post-conviction relief, the petitioner alleged that trial counsel did not question the victim about her inconsistent statements regarding the penetration. In his appellate brief, he acknowledges that counsel asked the victim about the inconsistent statements but argues for the first time that counsel should have “vigorously” cross-examined her about them. He also argues for the first time that counsel completely failed to question the victim about her inconsistent statements regarding the petitioner’s sexual position during the rape and other “smaller discrepancies.”

Our review of the trial transcript reveals that the victim testified on direct examination that the petitioner penetrated her anally. On cross-examination, co-counsel asked the victim if she spoke with a “nice lady” sometime after the rape and told the woman that the petitioner’s penis went “on top” of her buttocks. The victim testified that she did not remember making that statement but acknowledged that her memory about the rape would have been better when she spoke with the woman than it was at trial. On redirect examination, the victim maintained that the petitioner put his penis inside her buttocks. At the post-conviction evidentiary hearing, counsel stated that he did not remember the victim’s testimony being very different from what she told Pamela Scretchen. We note that we have almost no information about Scretchen’s interview with the victim. Neither the State nor the defense presented any evidence about the interview at trial, and a copy of the interview is not in the direct appeal or post-conviction records.¹ The petitioner also did not question trial counsel at the evidentiary hearing about the defense’s tone during its cross-examination of the young victim, its manner of cross-examining her, or why the defense failed to cross-examine her about any other alleged discrepancies in her trial testimony and statements she made to Scretchen. Thus, we conclude that the petitioner has failed to show that counsel rendered deficient performance. Regardless, given the evidence against the petitioner, he has failed to show any prejudice.

As for the petitioner’s claim that he received the ineffective assistance of counsel because his attorney failed to call any favorable witnesses, such as his psychiatrist, Dr. Auble, or Scretchen, to testify, the petitioner did not present any of those witnesses at the post-conviction hearing. Generally, “[w]hen a petitioner contends that trial counsel failed to discover, interview, or present witnesses in support of his defense, these witnesses should be presented by the petitioner at the evidentiary hearing.” Black v. State, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990). We may not speculate on what benefit the witnesses may have offered for the defense. Id. Accordingly, the petitioner has failed to demonstrate prejudice. We can find no evidence to preponderate against the post-conviction court’s finding that counsel was not ineffective.

¹The trial transcript indicates that the victim’s interview with Scretchen was videotaped.

III. Conclusion

Based upon the record and the parties' briefs, we affirm the judgment of the post-conviction court.

NORMA McGEE OGLE, JUDGE